APPENDIX E

EXCERPTS FROM THE LEGISLATIVE HISTORY COVERING THE ADMINISTRATIVE PROCEDURE ACT

EXCERPTS FROM SENATE DOC. 248

Excerpts from pamphlet of the U.S. Government Printing Office Pamphlet — *Administrative Procedure Act — Legislative History,* 79th Congress, 1944-46—Senate Document No. 248.

On Section 7(c) [5 U.S.C.A. #1006 (c)] from the Report of the Senate Committee on the Judiciary at p. 208:

> The second and primary sentence of the subsection is framed on the theory that an administrative hearing is to be compared with an equity proceeding in the courts. The mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant and unduly repetitious evidence is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon evidence which is plainly of the requisite materiality and competence; that is, "relevant, reliable, and probative evidence." Thus while the exclusionary "rules of evidence" do not apply except as the agency may as a matter of good practice simplify the hearing and record by excluding obviously improper or unnecessary evidence, the standards and principles of probity and reliability of evidence must be the same as those prevailing in courts of law or equity in non-administrative cases. There are no real rules of probity and reliability even in courts of law, but there are certain standards and principles—usually applied tacitly and resting mainly upon common sense—which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and

kind of case, but they exist and must be rationally applied. These principles, under this subsection, are to govern in administrative proceedings.

The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the subsection as well as to cases in which oral or documentary evidence is received in open hearing. Even in the latter case subject to the appropriate safeguards, technical data may as a matter of convenience be reduced to writing and introduced as in courts. The written evidence provision of the last sentence of the subsection is designed to cover situations in which, as a matter of general rule or practice, the submission of the whole or substantial portions of the evidence in a case is done in written form. In those situations, however, the provision limits the practice to specified classes of cases and, even then, only where and to the extent that "the interest of any party will not be prejudiced thereby." To the extent that cross-examination is necessary to bring out the truth, the party should have it. Also, an adequate opportunity must be provided for a party to prepare and submit appropriate rebuttal evidence.

From Report of Senate Committee on the Judiciary at p. 216:

The basic provision respecting evidence in section 7(c) [5 U.S.C.A. #1006(c)] that any agency action must be supported by plainly "relevant, reliable, and probative evidence"—will require full compliance by agencies and diligent enforcement by reviewing courts. Should that language prove insufficient to fix and maintain the standards of proof, supplemental legislation will become necessary.

EXCERPTS FROM SENATE DOC. 248

> The "substantial evidence" rule set forth in section 10(e) [5 U.S.C.A. #1009(e)] is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required.

From Report of the Committee on the Judiciary of House of Representatives at p. 270:

> The second and primary sentence of the section (Section 7(c) [5 U.S.C.A. #1006(c)] is framed on the premise that, as to the admissibility of evidence, an administrative hearing is to be compared with an equity proceeding in the courts. Thus, the mere admission of evidence is not to be taken as prejudicial error, there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon consideration by the agency of the whole record or so much thereof as a party may cite and

as supported by and in accordance with evidence which is plainly of the requisite relevance and materiality—that is, "reliable probative, and substantial evidence." Thus while the exclusionary "rules of evidence" do not apply except as the agency may as a matter of sound practice simplify the hearing and record by excluding improper or unnecessary matter, the accepted standards and principles of probity, reliability, and substantiality of evidence must be applied. These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand. But they exist and must be rationally applied. They are to govern in administrative proceedings. These requirements do not preclude the admission of or reliance upon technical reports, surveys, analyses, and summaries where appropriate to the subject matter.

The first and second sentences of the section therefore mean that, where a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weight it and decide in accordance with the preponderance. In short, these provisions require a conscientious and rational judgment on the whole record in accordance with the proofs adduced. The proof must be substantial, as provided in this section and also in section 10(e) where the term "substantial evidence" is discussed later in this report.

The provision on its face does not confer a right of so-called "un-limited" cross examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed

to unreasonable lengths by a party or whether it is required for the "full and true disclosure of the facts" stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is—as the section states—whether it is required "for a full and true disclosure of the facts." In many rule-making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings. The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the section as well as to cases in which oral or documentary evidence is received in open hearing. Even in the latter case, subject to the appropriate safeguards, technical data may as a matter of convenience be reduced to writing and introduced as in courts. Among these are technical statements, reports of surveys, analyses and summaries. The written evidence provision of the last sentence of the section is designed to cover situations in which, as a matter of general rule or practice, the submission of the whole or substantial portions of the evidence in a case is done in written form. In those situations, however, the provision limits the practice to specified classes of cases and, even then, only where and to the extent that "the interest of any party will not be prejudiced thereby." To the extent that cross-examination is necessary to bring out the truth, the party must have it. An adequate opportunity must also be provided for a party to prepare and submit appropriate rebuttal evidence.

Agencies must comply fully and the courts, pursuant to section 10 of the bill, must enforce all of these requirements diligently.

EXCERPTS FROM SENATE DOC. 248

Referring to Section 10(e), [5 U.S.C.A. #1009(e)] from the report of the Committee on the Judiciary of House of Representatives at p. 279:

> "Substantial evidence" means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7(c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less — suspicion, surmise, implications, or plainly incredible evidence. Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action or inaction. In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party.

From proceedings in the Senate at p. 320:

> Subsection (c) of section 7 relates to evidence. It provides that except as statutes otherwise provide, the proponent of a rule or order has the burden of proof. While any evidence may be received, as a matter of policy agencies are required to provide for the exclusion of irrelevant and unduly repetitious evidence, and no sanction may be imposed, or rule or order issued, except as supported by relevant reliable, and probative evidence. Any party may present his case or defense by oral or documentary evidence, may

submit rebuttal evidence, and may conduct reasonable cross-examination. However, in the case of rule making or determining applications for initial licenses, the agency may adopt procedures for the submission of evidence in written form so far as the interest of any party will not be prejudiced thereby.

Mr. Austin. Mr. President, at that point I wish the Senator from Nevada would yield for a question.

Mr. McCarran. I gladly yield to the Senator from Vermont.

Mr. Austin. Did the committee intentionally choose the language, "except as supported by relevant, reliable, and probative evidence" in order to avoid the rule of scintilla of proof? This phrase is very significant as I see it. On the review, for example, the case, in order to carry through as decided by the agency, would have to be supported by relevant, reliable, and probative evidence. That is, in my opinion, a very important forward step in judicial procedure, to say nothing about administrative procedure. For my part I am glad to see it in the bill.

Mr. McCarran. Let me say to the Senator from Vermont that in the preparation of this bill many obstacles were encountered. Some of us insisted that the testimony must be relevant, material, and competent, and that nothing else should be taken. However, representatives of agencies came before us and presented their views, saying that such a rule would curtail their operations, and that they ought to be given greater latitude. They said to us, "We are not lawyers. We are acting in a quasi-judicial capacity. We ought to be able to go outside and get hearsay

testimony, if you please. We might be able to indulge in theory." So rather than curtail the agencies, we sought an intermediate ground which we thought would be protective of the rights of individuals, and at the same time would not handicap the agencies. So we said to them, "You may go outside and get what would be secondary evidence, or hearsay; you may perhaps even go into the realm of conjecture; but when you write your decision it must be based upon probative evidence and nothing else. If in the formation of your decision you consider other than probative evidence, your decision will be subject to being set aside by a court of review."

In other words, we did not wish to destroy the administrative agencies or prescribe the methods under which they have been operating. Some of us know that in committees of the Senate we very fequently hear evidence which we know is hearsay. I doubt very much if any hearing is ever conducted in which, to some extent, hearsay is not admitted. But we believe and we now believe, that reasonable men can sift the grain from the chaff. Then we laid down the rule that the administrative agencies must not make a finding which impinges upon an individual unless there is behind such finding probative evidence to sustain it. That is what we have worked out in this bill. I have given the explanation at some length in answer to the Senator from Vermont.

Mr. Ferguson. Mr. President, will the Senator yield—

Mr. McCarran. I yield.

Mr. Ferguson. Would the Senator, then, say that the judgment or decision of the agency must be based upon stronger proof than a scintilla of evidence?

Mr. McCarran. Very much stronger.

Mr. Ferguson. The old rule which applied in the courts, particularly on certiorari, was that if there was any evidence to sustain the verdict or judgment, it should be sustained. The courts have many times so held. The Senator would say, would he not, that something more than "any evidence" is required to sustain such a decision?

Mr. McCarran. The answer is in the affirmative. We say that the evidence must be substantial probative evidence.

Mr. Ferguson. So we are changing the rule which has been applied in the past that any evidence, or a scintilla of evidence, as it is sometimes defined, is sufficient to sustain a verdict or judgment.

Mr. McCarran. We tried as best we could to establish a guide for administrative groups so that they would apply the rule in such a way that there would be substantial probative evidence behind their findings, and so that they could say, "We are not afraid to have our findings reviewed by a court."

Mr. George. Mr. President, will the Senator yield?

Mr. McCarran. I yield.

Mr. George. The courts have many times held that if there is any evidence to sustain the findings of an adminstrative board under the statute, the courts have no power to intervene. If this bill should become a law would that rule, as heretofore construed by the courts, remain in effect?

Mr. McCarran. The courts have given various constructions. The courts, in reviewing an order, are governed by the provisions of section 10(e), which states the substantial-evidence rule. In other words, in some instances the courts have held that there must be substantial evidence. We are saying that there must be probative evidence of a substantive nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding.

Mr. George. The point I wish to raise is that some of the acts of Congress, particularly those enacted in recent years, have led the courts to hold—and they so hold—that if there be any evidence to sustain the finding of a board or agency, the court has no power to interfere with it.

Mr. McCarran. I would put it in this way—

Mr. George. Would the enactment of this bill require some substantial or probative evidence to support such a finding?

Mr. McCarran. Yes.

Mr. George. Take the labor-relations cases. Senators are familiar with them. The circuit courts have frequently complained against what the Labor Relations Board did, but have said, "We are powerless to interfere with it." Would this bill change that rule, if the court were of the opinion that there was no probative evidence?

Mr. McCarran. Yes; it would change that rule.

Mr. George. I am pleased to hear it.

Mr. McCarran. I thank the Senator.

EXCERPTS FROM SENATE DOC. 248

From the proceedings in the House of Representatives at p. 364:

EVIDENCE, SECTION 7(C)

Subsection (c) of section 7 is one of the more important provisions of the bill. In its final report the Attorney General's Committee on Administrative Procedure stated that—pages 70-71:

> Although administrative agencies may be freed from observance of strict common-law rules of evidence for jury trials, it is erroneous to suppose that agencies do not, as a result, observe some rules of evidence. * * * Abuses in admitting remote hearsay and irrelevant or unreliable evidence there surely have been. * * * That strict adherence to standards of relevance and probative value should be observed needs no underscoring. A diffuse record dissipates the energies of the parties and the deciding authorities and distracts attention from the issues. Careless admission of evidence for what it is worth—a practice not infrequent among trial examiners—swells the record beyond its necessary limits.

Section 7 (c) of this bill provides that the proponent of a rule or order has the burden of proof except as statutes otherwise provide. It authorizes

agencies to receive any evidence, although as a matter of policy they are required to provide for the exclusion of irrelevant, immaterial, or unduly repetitious matter. Thus, the mere fact that such matter is in the record would not of itself be reversible error. The principal provision of the subsection provides that no sanction may be imposed or rule or order be issued except upon consideration of the whole record or such portions as any party may cite and as supported by and in accordance with reliable, probative, and substantial evidence. The parties are authorized to present documentary, oral, and rebuttal evidence and to conduct reasonable cross-examination. In rule making or determining applications for initial licenses agencies may adopt procedures for the submission of the evidence in written form, so far as the interest of any party will not be prejudicial thereby.

The requirement that agencies may act only upon relevant, probative, and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity. The same provision contains two other limitations—first, that the agency must examine and consider the whole of the evidence relevant to any issue and, secondly, that it must decide in accordance with the evidence. Under these provisions the function of an administrative agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference. Mere uncorroborated hearsay or rumor does not constitute substantial evidence—see Edison Co. v. Labor Board (305 U.S. 197, 230). Under this provision agencies are not authorized to decide in accordance with preconceived ideas or merely to sustain or vindicate prior administrative

action, but they must enter upon a bona fide consideration of the record with a view to reaching a just decision upon the whole of it.

From the proceedings in the House of Representatives at p. 370:

SCOPE OF REVIEW, SECTION 10 (E)

The final subsection or section 10 states the extent or degree of review which courts are required to afford under this bill. I have already referred to the exemption of situations in which Congress has specifically withheld review or in which action has by law been committed to the absolute discretion of administrative agencies.

Subsection (e) of section 10 requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions and the determination of the meaning or applicability of any agency action. They must compel action unlawfully withheld or unreasonably delayed. They must hold unlawful any action, findings, or conclusions which they find to be, first, arbitrary or an abuse of discretion; second, contrary to any provision of the Constitution; third, in violation of statutes or statutory rights; fourth, without observance of procedure required by law; fifth, unsupported by substantial evidence in any case reviewed upon the record of an agency hearing provided by statute; or, sixth, unwarranted by the facts so far as the latter are subject to trial de novo. In making these determinations the court is to consider the whole record or such parts as any party may cite and, where error has been fully cured prior to the effective date of agency action, the courts may apply the rule respecting nonprejudicial error.

EXCERPTS FROM SENATE DOC. 248

The term "substantial evidence" as used in this bill means evidence on the whole record as reviewed by the court and in the exercise of the independent judgment of the reviewing court is material to the issues, clearly substantial, and plainly sufficient to support a finding or conclusion affirmative or negative in form under the requirements of section 7(c) heretofore discussed. Under this section the function of the courts is not merely to search the record to see whether it is barren of any evidence, or lacking any vestige of reliable and probative evidence, or supports the agency action by a scintilla or by mere hearsay, rumor, suspicion, speculation, and inference —cf. *Edison Co. v. Labor Board* (305 U.S. 197, 229-30). Under this bill it will not be sufficient for the Court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some "tenuous support of evidence"—*Bridges v. Wixon* (326 U.S. at 178). Nor may the bill be construed as permitting courts to accept the judgments of agencies upon unbelievable or incredible evidence.

Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law must of course be tried and determined de novo by the reviewing court.

Whether a court is proceeding upon an administrative or a judicial record, the requirement of review upon the whole record means that courts may not look only to the case presented by one of the parties but must decide upon all of the proofs submitted.

Referring to Section 10(e) (5) [5 U.S.C.A. #1009(e) (5)] from the proceedings in the House of Representatives at p. 378.

Excerpts From Senate Doc. 248

Fifth. "A decision which is unsupported by substantial evidence" can be set aside. I mentioned just a little while ago that many cases in which decisions have been rendered upon a mere scintilla of evidence, and not on the weight of the evidence, have been discovered. In many instances the decisions have been based upon evidence which is not competent. But under the provisions of this bill it is required that all such decisions shall be based upon and predicated upon substantial evidence. That is the only fair basis upon which decisions of this character should be made by either a court or any agency assuming the authority to hear and determine cases.